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BEFORE THE ARIZONA CORPORATION C
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DOCKET NO. W-01445A-03-0559

STAFF'S CLOSING BRIEF

IN THE MATTER OF THE APPLICATION OF
ARIZONA WATER COMPANY TO EXTEND
ITS CERTIFICATE OF CONVENIENCE AND
NECESSITY IN CASA GRANDE, PINAL
COUNTY, ARIZONA.

I. INTRODUCTION AND BACKGROUND

More so than most cases that are brought before the Arizona Corporation Commission (“Commission”), this case is driven by its history. The grant of a Certificate of Convenience and Necessity (“CC&N”) by the Commission in Decision No. 69722 established Arizona Water Company (“AWC”) as the water service provider for the service territory. Commission Utilities Division Staff (“Staff”) believes that the consequence of that determination significantly impacts the nature of determinations that would either reduce or delete the CC&N or further condition the nature of service provided by AWC in the CC&N.

On August 12, 2003, AWC filed an application with the Commission for an extension of its Casa Grande CC&N. As explained in the Staff Report filed in this docket on January 9, 2004 in response to the original application, the extension request includes 11 square miles along the eastern boundary of AWC’s CC&N alongside Florence Boulevard. The extension area included land owned by two principal land developers, Florence Country Estates (located near Eleven Mile Corner and Florence Boulevard) and Harvard Simon (located approximately one and a half miles east of Hacienda Road and Florence Boulevard).

The Staff Report recommended approval of the CC&N extension request subject to certain conditions. What would prove to be the most significant condition recommended by Staff was that AWC should be required to obtain and file a copy of the developers’ Arizona Department of Water Resources Certificate of Assured Water Supply (“CAWS”) within 365 days of the effective date a Commission order on the application. Following an evidentiary hearing, a recommended order was

1 issued and the Commission voted to approve the CC&N extension request subject to Staff's
2 recommended conditions in Decision No. 66893 (April 6, 2004). Further, Decision No. 66893
3 ordered that failure to comply with the condition to supply the CAWS would result in the approval
4 being deemed null and void. Decision No. 66893 at 7.

5 On March 30, 2005, AWC filed a request for an extension of time to comply with the CAWS
6 requirement. Their request indicated that the developers, now identified as Harvard Investments and
7 Core Group Consultants, Ltd., were forecasting a one year delay in development. Shortly thereafter,
8 on April 7, 2005, Cornman Tweedy 560, LLC ("Cornman Tweedy") filed a letter in the docket
9 indicating its ownership of 1120 acres of land in the area and its views regarding the operation of the
10 null and void component of Decision No. 66893. The Administrative Law Judge ("ALJ") proceeded
11 to produce a recommended opinion and order based upon AWC's requested one year extension of
12 time.

13 The Commission did not approve the recommendation and the matter was scheduled for
14 additional evidentiary proceedings and briefing. At the conclusion of the evidentiary proceedings, a
15 new recommended opinion and order was produced and considered by the Commission. On July 30,
16 2007, the Commission approved Decision No. 69722 which, in pertinent part, determined that the
17 compliance conditions established for AWC in Decision No. 66893 had been fulfilled, that further
18 evidentiary proceedings would be held for purposes of determining whether AWC should continue to
19 hold a CC&N extension for the Cornman Tweedy area, and noticed AWC that the purpose of the
20 evidentiary hearing would be to consider whether to delete the Cornman Tweedy property from the
21 CC&N extension granted to AWC by Decision No. 66893.

22 An evidentiary proceeding was scheduled to examine the issues identified by Decision No.
23 69722. Pre-filed testimony was provided to the docket by AWC, Cornman Tweedy and Staff.
24 Following pre-hearing briefing regarding the scope and nature of the proceeding, as well as a motion
25 to strike pre-filed testimony, the matter progressed until extenuating circumstances rendered an
26 evidentiary hearing impracticable. By the agreement of all parties, the admissibility of the pre-filed
27 testimony was stipulated to and the matter was submitted on the briefs for judgment by the ALJ.

28 A recommended opinion and order resolving the matter was filed in the docket on November
30, 2010. The recommended order was discussed by the Commission during the December 14, 2010

1 Open Meeting and again at the February 1, 2011 Open Meeting. At the February 1, 2011 Open
2 Meeting, the Commission voted to remand the matter for additional proceedings regarding "whether
3 a public service corporation, like Arizona Water, in this water challenged area and under the
4 circumstances presented in this case, is providing reasonable service if it is not able or not willing to
5 provide integrated water and wastewater services."

6 Based upon that question, matters were scheduled to permit parties additional time for
7 discovery as well as an opportunity to discuss settlement. Ultimately, parties failed to reach a
8 settlement and parties focused on furthering their discovery efforts in anticipation of eventual
9 evidentiary hearings. Parties, including Staff, filed pre-filed testimony in relation to this phase of the
10 proceeding and the matter culminated in the latest round of evidentiary hearings that concluded on
11 February 23, 2016.

12 II. DISCUSSION

13 A. Staff's General Overview

14 In order to be responsive to both the inquiry posed by the Commission as well as the specific
15 questions directed to the parties by the ALJ, Staff will first provide its general view of the matter
16 before the Commission at this stage and then proceed to respond individually to each of the specific
17 ALJ questions.

18 Based upon Staff's review of the procedural history of this matter and the expressed remedy
19 sought by Cornman Tweedy, Staff believes that the matter remains in the nature of a CC&N deletion
20 proceeding as described by the *James P. Paul* case. Through its counsel and witnesses, Cornman
21 Tweedy has made clear that it desires the removal of its property from the area certificated for AWC.
22 See e.g., Tr. at 19, 30, 146-47. However, the CC&N that AWC received conditionally through
23 Decision No. 66893 is no longer subject to any compliance conditions due to the further order of the
24 Commission in Decision No. 69722. By determining that AWC has no further compliance
25 requirements, Staff views the CC&N awarded to AWC as no longer conditional. Because Decision
26 No. 69722 also ordered further proceedings to discuss the deletion of the Cornman Tweedy property
27 from the AWC CC&N, the decision confirms that the CC&N is no longer conditional. Staff views the
28

1 reference to deletion as an acknowledgement that the matter would be placed within a *James P. Paul*
2 deletion analysis.

3 Pursuant to the Arizona Supreme Court's decision in the *James P. Paul* case, the criteria for
4 deletion of a CC&N is that the CC&N holder is unwilling to provide adequate service at reasonable
5 rates upon request. *James P. Paul v. Arizona Corp. Comm'n*, 137 Ariz. 426, 431, 671 P.2d 404, 409
6 (1983). *James P. Paul* addressed the circumstance of the regulator that regrets the grant of CC&N
7 and attempts to retroactively undo the CC&N by means of other measures than deletion proceedings,
8 such as through the means of A.R.S. § 40-252. Citing to the *Trico* case, 92 Ariz. 373, 377 P.2d 309
9 (1962), the Court noted that eliminating a portion of a CC&N still requires notice and opportunity to
10 be heard and the inquiry is still whether the CC&N holder has failed or refused to render satisfactory
11 and adequate service at reasonable rates. *James P. Paul* at 428, 671 P.2d at 406.

12 Moreover, the Court indicated that indirectly removing the CC&N by means of A.R.S. § 40-
13 252 as if the CC&N had not been granted in the first instance is inappropriate. In Footnote 3 to the
14 Court's opinion, the Court noted that although the Commission may come to a later view that the
15 CC&N should not have originally been granted, such regret serves to explain why the Commission
16 would want to remove the CC&N, but does not provide a justification to do so. *Id.* at 429, 671 P.2d
17 at 407.

18 Because the last compliance hurdle remaining to AWC under Decision No. 66893 has been
19 deemed satisfied pursuant to Decision No. 69722, Staff views AWC's CC&N as perfected and thus it
20 is no longer assailable on grounds that AWC's CC&N authority is somehow inchoate or otherwise
21 unsettled. Thus, Staff does not agree with the contentions of Cornman Tweedy that the CC&N is not
22 now final. *See e.g.* Tr. at 21-23.

23 Therefore, providing the relief desired by Cornman Tweedy would inevitably require a CC&N
24 deletion in Staff's view. However, the inquiry articulated by the Commission that prompted this
25 phase of the proceeding does not immediately result in deletion. Rather, as noted by the ALJ in the
26 procedural order dated December 9, 2015, what constitutes "reasonable" service is a facet of the
27 A.R.S. § 40-321(A) analysis. A.R.S. § 40-321(A) provides:
28

1 When the commission finds that the equipment, appliances, facilities or service of any
2 public service corporation, or the methods of manufacture, distribution, transmission,
3 storage or supply employed by it, are unjust, unreasonable, unsafe, improper,
4 inadequate or insufficient, the commission shall determine what is just, reasonable,
5 safe, proper, adequate or sufficient, and shall enforce its determination by regulation or
6 order.

7 In Staff's view, A.R.S. § 40-321(A) applies to a specific type of interaction between the utility
8 and the regulator. In this type of interaction, the regulator has identified conduct or deficiencies in
9 technical capabilities demonstrated by the utility, specifies what constitutes a level of satisfactory
10 performance, and necessarily affords the utility an opportunity to cure. It is possible that in the event
11 that the utility proves unresponsive to an order of the Commission to improve its service to meet the
12 threshold established by Commission order that the utility would *then* be on a path toward CC&N
13 deletion. This would be effectuated by a further proceeding in the nature of a Complaint or an Order
14 to Show Cause why the CC&N should not be deleted. In this circumstance, it could be fairly said
15 that the utility, owing to its unwillingness to rectify deficiencies, is no longer fit and proper to hold
16 the CC&N. Further, this would comport with the *James P. Paul* standard in that the utility is not
17 providing what the Commission has determined to be adequate service at a reasonable rate.

18 **B. Staff's Response to ALJ Questions**

- 19 **1. Staff's response to the Commission's inquiry for this stage of the record:
20 whether a public service company like AWC in this water constrained
21 area, and under the circumstances of this case is providing reasonable
22 service if it is not able or not willing to provide integrated water and
23 wastewater services.**

24 As alluded to during the proceedings, Staff views the current expression of the issue presented
25 as substantially still a query into whether the CC&N held by AWC should be deleted. Staff views this
26 as a consequence of the relief sought by Cornman Tweedy.

27 The question presented by the Commission directs the parties to investigate whether AWC's
28 current mode of operations, i.e. providing solely water utility service, is reasonable in light of such
water constraints as are present under the circumstances of this case. As will be explained further in
response to the second ALJ question, Staff believes that a determination that AWC's service model is
unreasonable does not "tee up" the deletion of the current CC&N but instead presents AWC with an
opportunity to cure such deficiency. Further, it is clear from the testimony and assertions of counsel
for Cornman Tweedy that at this stage, it still seeks removal of its property from AWC's CC&N. *See*

1 e.g., Tr. at 19, 30, 146-47. To the extent that Cornman Tweedy has been inconsistent in stating that it
2 seeks deletion, it appears that this is largely due to a legal position that it has taken to the effect that
3 the CC&N held by AWC is somehow not yet perfected. Under Cornman Tweedy's view, the CC&N
4 should thus be amenable to a less stringent criteria for deletion than that prescribed by the Court in
5 *James P. Paul*.

6 Staff does not believe that the service model used by AWC is unreasonable. Staff's sense of
7 the benefits presented by integration of water and wastewater services is that integration has multiple
8 potential benefits, some of which promote the efficient utilization of water in all phases. However,
9 the primary benefit of integration is that it eliminates concerns about antagonistic relationships
10 between the water and wastewater utilities serving a common territory.

11 As described in the testimony of Mr. Soriano, and accepted by Staff as a general
12 characterization of the cooperation issue, a stand-alone water utility will, under ordinary
13 circumstances, experience an incentive to economically compete with a stand-alone wastewater
14 service provider that wishes to deploy treated wastewater for uses that would ordinarily be met
15 through sales by the water utility. See CT-101 (Rejoinder Testimony of Steven Soriano Phase II) at 6-
16 7; see also Exhibit No. CT-107 (Rebuttal Testimony of Fred Goldman Phase II) at 4-5 (discussing
17 stand-alone water provider's economic disincentive to promote effluent usage). Further, the
18 Commission has expressed concerns in the past regarding unhealthy relationships between stand-
19 alone water and wastewater utilities and that such antagonism is not in the public interest for various
20 reasons, including that it can interfere in the efficient use of water and treated wastewater. Such
21 concerns prompted the Commission decision that was reviewed by the Court of Appeals in the
22 *Woodruff* case.

23 In *Arizona Water Company v. Ariz. Corp. Comm'n*, 217 Ariz. 652, 177 P.2d 1224 (2008)
24 (more commonly referred to as the *Woodruff* case), the Commission awarded a CC&N to a startup
25 integrated water and wastewater utility rather than to AWC which was an established water utility
26 with an existing CC&N in the immediate vicinity. The Court of Appeals found that the Commission
27 had sufficient evidence on the record to (1) infer that integrated utilities would more likely work
28 toward common goals such as minimizing costs, and (2) determine that the cooperation between the

1 utilities could improve the opportunity to avoid the use of groundwater to supply the water needs of
2 the area. *Id.* at 661, 177 P.3d at 1233. As the court recognized, AWC had a recent history of
3 litigiousness toward wastewater utilities operating within a common service territory.

4 This evidence would allow one to conclude that such a coordinated effort in the use of
5 effluent could result in an overall reduction in the use of groundwater, which would be
6 a benefit to the public. Although unaffiliated companies could coordinate such efforts,
7 we cannot fault the Commission for concluding that affiliated companies would more
8 likely do so. Indeed, evidence before the Commission suggested that such cooperation
9 would not be forthcoming from Arizona Water, which had sued wastewater companies
10 for selling effluent within Arizona Water's service areas. For these reasons, we decide
11 that reasonable evidence supported the Commission's conclusion that Woodruff
12 Water's ability to coordinate efforts with Woodruff Utility would benefit the public.

13 *Id.*

14 Notwithstanding Staff's and the Commission's sense of AWC's then recent history of
15 litigiousness at the time of the *Woodruff* case, Staff analyzes each case on its own merits. When there
16 is an integrated provider option, Staff will typically consider that to be a benefit to the effect that it
17 eliminates any uncooperativeness concerns at the outset. That is of particular concern for a new
18 CC&N because stand-alone wastewater utilities are particularly vulnerable financially. *See Woodruff*
19 at 661, 177 P.3d at 1233 (noting testimony of Steve Olea that in the award of a new CC&N, there is
20 the concern of the financial viability of the utilities and, in particular, startup wastewater utilities). As
21 the record evidence in the case herein demonstrates, wastewater utilities can have difficulties
22 collecting bills and typically do not have the implied threat of disconnection as a readily available
23 means to instill timely payment for utility service. *See Exhibit No. CT-104 (Direct Testimony of Paul*
24 *Hendricks) at 5 (noting financial vulnerability of sewer utilities to nonpayment of bills).*

25 However, an examination of the service provided by AWC under the circumstances presented
26 here does not lead to a conclusion that the service it is providing is unreasonable. The question posed
27 by the Commission posits that there is a particular water constraint within the service territory
28 covered by AWC's CC&N and suggests that an integrated water and wastewater utility would be
better situated to provide reasonable service than a utility that employs the standalone water provider
format used by AWC. Staff acknowledges that the area in question is located in a desert. However,
so too is the large majority of land in Arizona. The record tends to reflect that the CC&N is facing

1 water management issues that are similar to any other desert area within Arizona, rather than a water
2 scarcity constraint that is particular to the locale.

3 Further, it is premature to conclude that AWC cannot provide reasonable service even if it
4 does not provide integrated service. Staff recognizes that there are several potential benefits to
5 integration beyond eliminating potential confrontations between water and wastewater providers
6 serving a common territory. With respect to the principal benefit Staff has identified, removing a
7 source of conflict between two utility service providers, Staff's view is that there is a slight
8 preference for integrated providers when evaluating an application for a *new* CC&N or an extension
9 of a CC&N. Because AWC's CC&N is no longer conditional by virtue of the Commission's
10 determination in Decision No. 69722, Staff does not view its preference for integrated providers as
11 being invoked under the present circumstances.

12 As recognized by the Court in *Woodruff* that unaffiliated utilities can coordinate efforts toward
13 the efficient usage of groundwater and reused water (*Woodruff* at 661, 177 P.3d at 1233), Staff
14 believes the record here reflects that there are other measures short of integration that can accomplish
15 the same objectives of mitigating potential friction between unaffiliated water and wastewater
16 providers operating within a common service territory. To the extent that the most obvious source of
17 conflict relates to each utility's economic incentives to sell its water commodity, the record reflects
18 that there are multiple means to accomplish that end. As Mr. Garfield testified on behalf of AWC,
19 once the amount of revenue "sacrificed" by the water utility in lieu of wastewater utility sales are
20 known, it is possible through a review of lost billing determinants to adjust the water utility's
21 revenues in a rate case to provide the water utility with rates that afford it an opportunity to recover
22 its original investment and earn a return on its investment. *See e.g.*, Tr. at 504-06.

23 Both Mr. Garfield and Mr. Walker agreed that there are other rate measures that the
24 Commission can authorize that can reduce the disincentive experienced by the water utility to
25 facilitate competing transactions made by the wastewater provider that directly impact the water
26 utility's capacity to make sales. *See, Id.*; Tr. at 662-63. Mr. Garfield agreed with the comparison of
27 the issue to the Commission's Energy Efficiency rules where an incumbent utility is required to
28 promote programs that will have the impact of reducing the utility's commodity sales. Tr. at 504-05.
It seems apparent that just as the Commission managed to fashion rate-based remedies to alleviate the

1 disincentive of gas and electric utilities to promote measures that will undermine their sales, that so
2 too the Commission can use rate design measures to mitigate the disincentive for water utilities to
3 cooperate with wastewater utilities. *Id.*

4 Although conservation was the issue rather than an alternative service offering by a
5 wastewater provider, AWC has requested and received a rate adjustment for lost revenues in its last
6 Northern Group rate case. *See* Decision No. 74081 (September 23, 2013) (approving a declining
7 usage adjustment calculated as a five percent reduction to test year billing determinants). Likewise,
8 in light of the rate design measures that the Commission has adopted in similar circumstances
9 regarding energy efficiency, Staff believes that the Commission has multiple tools, particularly
10 through rate making means, to ameliorate the economic incentives toward antagonism between stand-
11 alone service providers in common service areas.

12 In light of the limited record demonstrating exceptional water constraints focused on the
13 locale and that there are potential alternative means to accomplish the same ends that integration
14 provides, Staff believes it is too early to conclude that AWC's service is unreasonable under the
15 circumstances presented in this case.

16 **2. What is the significance and scope of a Commission determination**
17 **regarding the inquiry? Is it intended to be universally applicable or**
18 **would it only be applicable to AWC as to the specific Cornman Tweedy**
property?

19 Staff believes that a Commission decision in this matter, although fashioned to apply solely to
20 the Cornman Tweedy property, could still have a larger impact. As a general proposition, Staff
21 maintains that the scope of a Commission determination is limited specifically to only the case that is
22 before the Commission. This is both because of the limitations of what was noticed (which may
23 confine the scope of outcomes of a Commission decision) but also because Staff has consistently held
24 the position that the Commission is not bound by the concept of *Stare Decisis* and so is free to reach
25 its conclusion in each case entirely on the merits of the matter that is directly before it.

26 However, Staff recognizes that a Commission determination in a high profile matter may
27 acquire a prominence among interests that view the Commission's determination as a signal from the
28 Commission regarding how it might view similar circumstances. That said, Staff would continue to

1 provide recommendations based on the merits of each individual case regardless of the nature of the
2 Commission's determination in this proceeding.

3 As discussed elsewhere in this brief, Staff views the quality of AWC's service as being
4 reasonable under the circumstances. Although there is little in the way of guidance in the case law
5 providing examples of what would be reasonable, Staff believes the case law supports the proposition
6 that pursuant to A.R.S. § 40-321(A), the Commission has the authority to determine what is
7 reasonable based upon an appropriate evidentiary record. In reliance on the analysis of A.R.S. § 40-
8 321(A) provided by the Court in *Palm Springs Utility*, Staff believes that the Commission's order
9 need not apply universally. *Arizona Corporation Commission v. Palm Springs Utility Co.*, 24
10 Ariz.App. 124, 536 P.2d 245 (1975) involved the application of A.R.S. § 40-321(A) in a context
11 where the Commission had not previously established by rule a criteria for reasonable service which
12 it latter applied to solely one utility by order. The Court in *Palm Springs Utility* found that the
13 Commission need not have previously determined a threshold for reasonableness and further
14 promulgated that standard by rule so long as there is a rational statutory or constitutional basis for the
15 Commission's determination and action is not so discriminatory as to constitute a denial of the equal
16 protection clause. *Id.* at 129, 536 P.2d at 250.

17 Applied to the circumstances presented here, Staff believes that a determination in this matter
18 should be particular to AWC but would recommend that it be tailored to an issue reasonably unique to
19 the circumstances present within AWC's service territory here.

20
21 **3. What is the status of AWC's CC&N authority regarding the Cornman
Tweedy property and the standard for revocation of such authority?**

22 As stated earlier in Staff's general analysis of this matter, Staff views the current state of
23 AWC's CC&N as being a perfected CC&N. Staff has previously asserted in briefing at earlier stages
24 of this matter that in order to reach a conclusion that deletion is appropriate, a showing of one of two
25 circumstances would be necessary. The first is that AWC has failed the *James P. Paul* criteria to
26 either be unable or unwilling to provide adequate service at reasonable rates upon request. The
27 second is the circuitous route whereby there is a determination that AWC is not fit and proper to hold
28 the CC&N.

1 Under the facts of this case, no party has asserted that AWC is not fit and proper to provide
2 service. On the record, Dr. Goldman testified that AWC is very clearly a fit and proper water
3 provider. Tr. at 244; *see also* Tr. at 145 (testimony of Steve Soriano noting that AWC is "not wrong
4 or evil or anything like that"). At this stage, Staff anticipates that the only way to reach a conclusion
5 that AWC is not fit and proper would be to change the criteria that would constitute adequate or
6 reasonable service. For instance, if by order of the Commission pursuant to A.R.S. § 40-321(A),
7 AWC was directed to take an action and to then fail to comply/modify its service so as to satisfy the
8 new criteria for reasonableness or adequacy.

9 Were such a set of events to develop, Staff would anticipate that the standard for revocation
10 would be under the fit and proper analysis. These criteria, in general terms, are whether the utility
11 has the technical, financial and managerial capacity to provide the certificated service. In terms
12 consistent with an enforcement proceeding, the allegation would be that AWC is no longer fit and
13 proper because its conduct demonstrates that its service does not meet the technical adequacy
14 requirements set out by the Commission, is financially inadequate because it cannot afford to remedy
15 the condition previously identified by the Commission as being in need of improvement, or is
16 managerially unqualified because the leadership of the utility is no longer responding to the lawful
17 commands of the regulator.

18 In practice, the most common bases for deletion of CC&N under this analysis is that the
19 utility is no longer managerially fit and proper or that the utility is not sufficiently technically
20 proficient to provide adequate service. With respect to managerial failings, these are typified by
21 utilities that fail to file annual reports, a simple exercise that involves little difficulty for most utilities
22 and indicates a profound lack of regulatory responsiveness by a utility when it occurs. With respect
23 to technical adequacy, this is typified by Staff initiated complaints and orders to show cause against
24 utilities that are violating the minimum standards established in the Commission's rules and often
25 involves a multitude of deficiencies (such as failure to maintain adequate water pressure or failure to
26 provide water that meets Department of Environmental Quality standards for potability).

27 **4. What issues need to be addressed at this stage of the remand and what is**
28 **Staff's position as to each of these issues?**

1 Staff has not identified any additional issues that are not fully addressed by the questions
2 posed by the ALJ during the February 12, 2016 pre-hearing conference.
3

4 **5. What party has the burden of proof for each of the issues that needs to be
addressed at this stage?**

5 Respecting the issue of what party bears the burden of proof for a given issue, Staff maintains
6 that the general rule is applicable here and that is that the proponent of a particular outcome on a
7 given issue bears the burden of proof to demonstrate the merits of granting the requested outcome.

8 Staff views AWC's CC&N as perfected and that the only methods for deletion at this point
9 would be under the criteria set out by *James P. Paul*, or a complaint that AWC is no longer fit and
10 proper. Absent a change in the criteria to provide the water utility service for which AWC is
11 certificated, Staff does not believe that AWC's service would fail a fit and proper analysis. Thus Staff
12 would not be the proponent of deletion under that analysis.

13 Likewise, respecting deletion under a *James P. Paul* standard, Staff believes that the party
14 seeking deletion would have the burden to show that deletion is appropriate. Staff is not aware of any
15 request for service having been made to AWC that AWC has declined or proven incapable of meeting
16 at the tariffed rates which Staff would view as the reasonable rates to charge. Consequently, Staff is
17 not advocating deletion of AWC's CC&N.

18 Because Cornman Tweedy is the party that seeks to remove its property from AWC's CC&N
19 and because that would necessarily involve a deletion, Staff's position is that Cornman Tweedy
20 would bear the evidentiary burden of demonstrating that the factual record supports the elements
21 necessary to determine that deletion is legally appropriate and permissible.

22 **6. What standard of proof must be applied to each of the issues that needs to
be addressed at this stage of the remand?**

23 Generally there are three standards of proof that are, in order of increasing difficulty,
24 preponderance of the evidence, clear and convincing, and beyond a reasonable doubt. Beyond a
25 reasonable doubt is only applicable in criminal proceedings, which is not the case under these
26 circumstances. Staff believes that as between mere preponderance of the evidence and clear and
27 convincing, that the appropriate standard is the preponderance of the evidence standard.
28

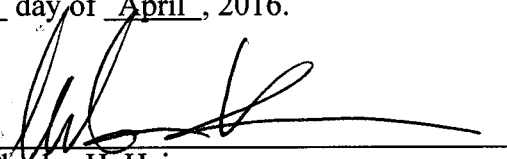
1 Clear and convincing is a standard that, in civil matters, is generally only applicable in two
2 principal categories of matters. The first is fraud and the second is malpractice. The standard is not
3 readily defined in terms of a bright line threshold. Rather, it occupies a place of greater stringency
4 than preponderance but a somewhat lower burden than beyond a reasonable doubt. Perhaps owing to
5 the wide span that exists between preponderance, which is a simple more-likely-than-not, and beyond
6 a reasonable doubt, which is just shy of certainty, clear and convincing is a standard that is rarely
7 practical beyond the application to the narrow areas of fraud and malpractice.

8 Staff submits that the appropriate standard of proof under the circumstances presented is the
9 same as is used for the substantial majority of all Commission matters, excepting perhaps Securities
10 matters. That is to say, Staff believes that a preponderance of the evidence standard would be
11 appropriate under the circumstances.

12 III. CONCLUSION

13 In conclusion, Staff views the matter as a deletion proceeding. Staff does not believe that the
14 factual record supports deletion either because AWC is no longer fit and proper or because it has
15 failed the *James P. Paul* standard.

16 RESPECTFULLY SUBMITTED this 4th day of April, 2016.

17 
18 _____
19 Charles H. Hains
20 Bridget A. Humphrey
21 Attorneys, Legal Division
22 Arizona Corporation Commission
23 1200 West Washington Street
24 Phoenix, Arizona 85007
25 (602) 542-3402
26
27
28

1 Original and thirteen (13) copies of
2 the foregoing were filed this 4th day
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3 Docket Control
4 Arizona Corporation Commission
1200 West Washington Street
5 Phoenix, Arizona 85007

6 Copy of the foregoing mailed/delivered
7 this 4th day of April, 2016 to:

8 Steven A. Hirsch, Esq.
9 Quarles & Brady LLP
One Renaissance Square
Two North Central Avenue
Phoenix, Arizona 85004
10 Attorneys for Arizona Water Company

11 Jeffrey W. Crockett, Esq.
12 CROCKETT LAW GROUP, PLLC
2198 East Camelback Road, Suite 305
Phoenix, Arizona 85016

13 Peter M. Gerstman, Esq.
14 Vice President and General Counsel
ROBSON COMMUNITIES, INC.
15 9532 East Riggs Road
16 Sun Lakes, Arizona 85248-7463

17
18 Roseann Osorio
19
20
21
22
23
24
25
26
27
28